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No. 89-1827

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SILAS E. COUNTS,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MISCELLANEOUS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

A. SCOPE OF QUESTION PRESENTED.

Respondent, Burlington Northern Railroad Company (BN), takes issue with the manner in which petitioner, Silas E. Counts (Counts), has stated the scope of the question presented for review. Contrary to BN's myopic view, this matter involves more than just the "fraudulent inducement" of the "release" of a FELA claim. Counts alleged a number of intentional torts committed by BN in the investigation, negotiation, settlement *and* release of his FELA claim, including misrepresentation, deceit, economic duress, coercion *and* fraud.

BN is *incorrect* in representing to this Court that Counts did not allege intentional torts other than fraud in Cause No. CV-86-87-H-CCL. The opinion of the Ninth Circuit Court of Appeals very clearly sets forth the

facts of BN's intentional misrepresentation, deceit and economic coercion. In order to properly address the important issue of federal preemption presented by this case, this Court has the right to be informed of the full scope of BN's misconduct in not only obtaining the release, but in also investigating, negotiating and settling Counts' claim.

B. INVALIDATION OF THE RELEASE.

BN disingenuously suggests that because a jury in May 1990 found the release to be invalid, it cannot, therefore, be concluded that BN "engaged in any improper conduct." Given the facts as recited by the Ninth Circuit's opinion (Appendix at 1a), BN cannot seriously contend that its conduct was anything but improper. Indeed, the jury was instructed on fraud, misrepresentation *and* economic coercion and the evidence clearly supported invalidation of the release on any or all of those grounds. If BN truly believes that its conduct was not improper, then let it defend its actions before a state court jury, just as any other citizen would be required to do.

C. DEDUCTION OF RELEASE AMOUNT.

Contrary to BN's insinuation, the District Court will reduce Counts' FELA damages by the amount paid by BN in exchange for the release. The District Court will be required to do so pursuant to *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968). Thus, BN will actually be rewarded for its intentional misconduct by a reduction of Counts' FELA damages. Certainly, Congress could never have intended to permit such corporate larceny when it enacted the FELA.

D. THIS COURT HAS NOT ALREADY DECIDED THE QUESTION PRESENTED.

According to Sup. Ct. R. 15.1, the purpose of BN's brief in opposition is to assist the Court "in the exercise of its discretionary jurisdiction". Rather than fulfilling this purpose, BN's brief attempts to mislead the Court into believing that it has already decided the question of federal preemption of state intentional tort law within the context of the investigation, negotiation, settlement and release of a FELA claim. Counts respectfully submits that this Court has *not* previously decided the issue presented by this case.

In *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359

(1952), this Court did *not* rule that state law causes of action for intentional torts are preempted by the FELA. The Court simply held that in negligence actions brought pursuant to the FELA where a release is raised as a defense, federal law rather than state law applies to determine the validity of the release:

> We...hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages *negligently* inflicted. State laws are not controlling in determining what the incidents of *this* federal right shall be.

Id. at 361 (emphasis added). Thus, the Court held that in determining the "incidents" of the *negligence* cause of action created by the FELA, federal law will apply. The Court did not discuss the preemption of state intentional tort law in cases such as this.

Since the question presented has *not* been previously decided by this Court, there is a compelling reason for granting the Writ. Unless the Court accepts jurisdiction, there will be a huge void in the law. The FELA will not provide a remedy and state law will be preempted from filling the void. Railroad employers should not be permitted and perhaps encouraged to take advantage of this void to commit intentional torts for which there is, at present, no remedy.[1]

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[1] In *State v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 484 P.2d 1146 (Wash. 1971), a state law requiring modern spark arresters on locomotives was upheld against a preemption challenge under the Federal Boiler Inspection Act, 45 U.S.C. § 23, because there was no federal law governing the same subject. The court held:

> Were we to hold otherwise, the state would be left with an *untenable void*—without the protection of federal regulations, yet, at the same time, prevented from enacting regulations of its own for the protection of the property of its citizens against an obvious and serious hazard.

Id. at 1149 (emphasis added). By the same token, without action by this Court, defrauded employees such as Counts will be left without any protection from a railroad's intentional misconduct.

E. STATE INTENTIONAL TORT LAW DOES NOT CONFLICT WITH THE FELA.

The focus of BN's argument appears to be that state intentional tort laws somehow conflict with the FELA's "uniform" set of laws and that, therefore, such state laws are preempted. BN's argument clearly misses the mark. Since the FELA does not even touch (let alone occupy) the field of intentional tort law, there is simply no way that state intentional tort laws can conflict with the negligence provisions of the Act.

The application of state intentional tort laws to conduct such as that exhibited by BN in this case will not frustrate or impede Congress' intent to provide a uniform set of laws governing an employee's cause of action for personal injuries *negligently* inflicted by his railroad employer. Counts is not requesting this Court to apply state negligence law in an attempt to change or "trench" on areas already governed by the FELA. State intentional tort law is a necessary companion to a federal Act which was never intended to occupy the field of intentional tort law.

Certainly, the Court of Appeals recognized the validity of Counts' argument that there must be a right or entitlement to some additional recovery due to BN's intentional misconduct which is not provided under the FELA. Whether such additional recovery be by virtue of state law or federal common law, the FELA was not intended to preempt all such avenues of relief. Indeed, BN ignores the legislative history of the FELA which patently demonstrates a Congressional intent to leave all preexisting common law remedies intact. 45 Cong. Rec. 4044 (1910). Appendix at 20a. BN's simplistic recitation of the "trade-offs" allegedly resulting from the FELA's enactment is out of place. Although Congress created a uniform set of laws dealing with *negligence* actions, it did *not* enact a "comprehensive" set of laws governing intentional misconduct such as that committed by BN in this case. In the Congressional "balancing" act referred to by BN, intentional tort law was left out of the equation.[2]

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[2]An analogous situation can be found in the workers' compensation field where the majority of courts have held that the enactment of comprehensive workers' compensation benefit schemes does not preempt or bar an independent action for intentionally tortious conduct committed by a workers' compensation insurer or employer during the processing and settlement of a workers' compensation claim. *See, Birkenbuel v. Montana State Comp. Ins. Fund*, 687 P.2d 700 (Mont. 1984) and authorities cited therein.

It is interesting that BN does not even attempt any preemption analysis. *See, California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). BN must realize the weakness of its position. It refuses to acknowledge that federal preemption must not be lightly presumed. Only if this Court intercedes and exercises its jurisdiction will railroad employees be protected from the ongoing misconduct of railroad employers, such as the BN in this case.

CONCLUSION

BN's objections are without merit. The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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